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SUPREME COURT, U.S.

No. 81-6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Cross-Respondents

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State ,

Defendants

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Cross-Petitioner.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should review be granted of rulings below which allowed plaintiffs and intervenors to proceed pseudonymously where they sought an order granting them, not the right to marry, but the opportunity to present evidence of their maturity to marry before an appropriate state official and where the defendant neither made a motion requesting that the plaintiffs' identities be revealed nor initiated any of the discovery methods provided in the Federal Rules of Civil Procedure?

2. Should review be granted of the ruling below denying abstention when the Second Circuit's judgment and decision on abstention were filed over a year before the cross-petition was filed and where the abstention rulings were consistent with this Court's abstention decisions?

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No.

IN THE
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OCTOBER TERM 1981

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Cross-Respondents

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State,

Defendants

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Cross-Petitioner.

Cross-Respondents' Brief In Opposition to Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioners, Cross-Respondents Cristina Coe and Pedro Doe respectfully pray that this Court issue a Writ of Certiorari to review that part of the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on January 11, 1982, which upheld the constitutionality of New York Domestic Relations Law § 15 and denied plaintiffs motion for summary judgment, but deny the cross-petition to review that part of the judgment which allowed plaintiffs and plaintiffs-intervenors to proceed pseudonymously and the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on December 19, 1980 which held absention unwarranted.

OPINIONS BELOW

On March 19, 1980 the Honorable Morris J. Lasker, District Judge, United States Court for the Southern District of New York, granted an ex parte order permitting Maria Moe, Raoul and Ricardo Doe to commence and prosecute their case in forma pauperis and under pseudonyms. (See Appendix, p. A-1.) The complaint was filed the same day. The case was assigned to the Honorable Constance Baker Motley.

In a decision dated July 10, 1980 (Appendix to cross-petition) the district court dismissed the complaint on the ground of abstention. In a judgment and decision dated December 9, 1980 (Appendix D to petition) the United States Court of Appeals for the Second Circuit reversed. Moe v. Dinkins, 635 F.2d 1045 (1980). The Second Circuit found that the statute was "clear," no ambiguous words or phrases existed, the parties concurred on the import and application of every material term and that the State's suggestions of ambiguity were "remote, implausible" and did not justify abstention. Moe v. Dinkins, 635, F.2d 1048, 1050 (Appendix D to petition, pp. D.4, D-6).

On remand, the district court certified a plaintiff class in an order and decision dated June 29, 1981 (Appendix C to petition) (unpublished). The district court granted the motion of Cristina Coe and Pedro Doe to intervene as plaintiffs and additional class representatives and to proceed pseudonymously in an order and decision dated August 17, 1981 (Appendix "B" to petition) Moe v. Dinkins, 533 F. Supp 623 (1981). The court also denied plaintiffs motion for summary judgment and granted summary judgment for defendants. The court rejected defendant's objection that the true names of plaintiffs and plaintiffs-intervenors (hereafter jointly referred to as plaintiffs) had not been revealed to the defendant. The court stated that it was common for plaintiffs to be permitted to proceed under pseudonyms in cases which concerned issues of a highly sensitive and personal nature such as marriage and illegitimacy.

The court held that the plaintiffs had alleged facts sufficient to demonstrate that they had the personal stake in the outcome of the controversy needed to confer standing and that the facts which the defendant disputed were not material to the constitutional question presented or to the relief plaintiffs requested. The court further pointed out that the plaintiffs did not seek an order mandating their marriage, but only a determination that they were entitled to an opportunity to present to the appropriate state official facts relevant to a determination of whether a marriage license should issue. Moe v. Dinkins, 533 F. Supp at 627. (Appendix B to petition p. B-10).

The court also rejected the defendant's attempts to relitigate the issue of abstention. The court found that the defendant's contention that the challenged statute was ambiguous and could be interpreted to allow of the appointment of a guardian who could consent to plaintiffs' marriage was controlled by and contrary to the prior Court of Appeals ruling in December, 1980. Moe v. Dinkins, 533 F. Supp at 627 (Appendix B to petition, p. B-8). On August 24, 1981 the district court ordered the sealing of the intervenor complaint and affidavits which contained the true names of Cristina Coe and Pedro Doe.

The United States Court of Appeals for the Second Circuit affirmed the decision of the district court in an opinion and order filed January 11, 1982 (Appendix A to the petition) (unpublished).

JURISDICTION

This Court does not have jurisdiction of cross-petitioner's writ to review the lower court's abstention decision. The judgment and opinion of the United States Court of Appeals for the Second Circuit on the issue of abstention was filed on December 19, 1980. The defendant's cross-petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was not filed within ninety days of that date as required by 28 U.S.C. § 2101(c). The cross-petition was not filed until May 13, 1982.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision and statute relevant to the issues raised in the cross-petition are the Fourteenth Amendment to the United States Constitution and New York Domestic Relations Law § 15 (McKinney 1977).

STATEMENT OF THE CASE

The cross-petitioner's statement of the case regarding Cristina Coe and Pedro Doe contains errors. Petitioner refers this court to the statement of the case in the petition for a correct rendition of the facts. The defendant's statement of the case regarding Maria Moe, Raoul Ricardo Roe also contains errors. Maria, Raoul and Ricardo did not join in the petition. However, the facts relevant to the issues raised in the cross-petition are related in section below entitled, Reasons Why the Cross-Petition for a Writ of Certiorari Should be Denied.

REASONS WHY THE CROSS-PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

POINT I

THE DETERMINATION TO ALLOW PLAINTIFFS TO PROCEED PSEUDONYMOUSLY IS CONSISTENT WITH COMMON PRACTICE IN THIS AND LOWER FEDERAL COURTS, WAS BASED ON THE RELIEF REQUESTED AND THE SPECIFIC PROCEDURAL HISTORY OF THIS CASE AND DOES NOT PRESENT ANY NOVEL ISSUES.

The lower courts' determinations to allow plaintiffs to proceed pseudonymously were routine and typical. Commencement and prosecution of an action by plaintiffs under pseudonyms is a common and well accepted practice, particularly in cases which, like this one, involve issues of a sensitive and highly personal nature. See e.g. Roe v. Wade, 410 U.S. 113 (1973); Doe v.

Bolton, 410 U.S 179 (1973) (challenges to prohibition of abortion); Poe v. Ullman, 367 U.S. 497 (1961) (challenge to ban on contraceptives) MS. v. Wermers 557 F.2d 170 (8th Cir. 1977) (challenge to parental consent for minors to receive contraceptives; Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975); (challenge to requirement of parental consent for minors to obtain an abortion); Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976) (minors suit against foster care agencies for failure to place them); Doe v. Des Champs, 64 F.R.D. 652 (D. Mont. 1974) (challenge to abortion statute); Roe v. Ingraham, 364 F. Supp. 536 (S.D.N.Y. 1973); rev'd on other grounds, sub nom. Whalen v. Roe, 429 U.S. 589 (1977) (challenge to requirement that physicians file prescription forms containing identity of patients receiving prescriptions for certain drugs); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972) (challenge to requirement to identify putative fathers of illegitimate children).

Moreover, the courts' determinations to allow plaintiffs to proceed pseudonymously were consistent with New York State policy to preserve the privacy of minors seeking to marry. New York Domestic Relations Law § 15.3 (McKinney 1977) provides for the sealing of all papers and records pertaining to the application for judicial approval of a minor's marriage. See In re Power and Burns, 96 Misc.2d 182, 408 N.Y.S.2d 761, unnumbered footnote (Family Ct. Yates Co. 1978) in which the court noted that Powers and Burns were fictitous names for minor plaintiffs seeking judicial approval of the issuance to them of a marriage license.

Although neither the Federal Rules of Civil Procedure nor the local rules of the United States District Court for the Southern District contain rules regarding proceeding under pseudonyms, the Southern District clerk's office has established a routine procedure which was followed in this case. Before

filing the case, the plaintiffs submitted to the court clerk, a complaint containing pseudonyms, a complaint containing true names, an ex parte application to proceed under pseudonyms accompanied by two sets of affidavits, one set with pseudonyms, one set with true names, a memorandum of law and a proposed order. These papers were taken before a district court judge and after review he signed an order granting plaintiffs permission to proceed pseudonymously and ordering the sealing of the complaint and affidavits containing true names, to be unsealed only upon court order. (See Appendix p. A-1 - A-2.) The court clerk then sealed in an envelope the complaint and affidavits containing true names and filed in the public court files the complaint and affidavits containing pseudonyms, the application, memorandum and order.

The cross-petition here bases his petition on the ground that the plaintiffs true names were never revealed to him. Yet he never made a motion for such relief nor used any of the discovery methods provided by the Federal Rules of Civil Procedure.* If he had done so the plaintiffs would have had the opportunity to present their concerns to the court and request an order which protected the plaintiffs against possible harrassment, ensured that the information disclosed would be kept confidential and prevented unnecessary investigation of neighbors and employers, which would have resulted in increased stigmatization of the couples and and their children because of their illegitimate status.

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* On April 23, 1980 defendant filed a motion to dismiss on abstention and other grounds in the district court. In support of his motion defendant's affidavit stated that he wanted the name of Maria Moe's mother so that he could refer the mother to appropriate authorities for investigation. In his reply brief he stated that should the case continue he would require plaintiffs' identities in order to investigate their claims. On May 5, 1980 plaintiffs moved for class certification. On July 17, 1980 the district court granted the defendant's motion to dismiss on the grounds of abstention but made no determination on the defendant's other motions or plaintiffs' motion for class certification. In December 1980, the Second Circuit reversed the district court's abstention decision and remanded the case to the district court. On March 13, 1981, the district judge held a conference to discuss with

(Footnote continued)

The cross-petitioner's unprecedented position is that he had the right to be gratuitously informed of the identity of the plaintiffs and allowed to do whatever he wanted with the information, without having to make a motion or initiate any discovery or present support for his request to a court and without allowing the plaintiffs to have the court hear their concerns.*

(Footnote continued from previous page)

the parties what issues were outstanding and how the case would proceed. The district court scheduled the defendants' outstanding motion and plaintiffs' motion for class certification to be heard on March 27, 1981. (See Judge Motley's Pretrial Schedule and Order, attached in Appendix, p. A-3.) The defendants did not mention any objection to the plaintiffs proceeding pseudonymously and specifically did not state they could not defend against plaintiffs' class certification motion without the true names of plaintiffs. On March 27, 1981 the district court heard and determined defendants' and plaintiffs' motions and discussed further scheduling. Plaintiffs informed the court and the defendant that they intended to move for summary judgment. (See Judge Motley's Pretrial Schedule and Order, attached as Appendix, p. A-5.) Again the defendants did not mention any objection to the plaintiffs' proceeding pseudonymously. The parties appeared again before Judge Motley on April 24, 1981. The defendants did not mention any objection to plaintiffs proceeding pseudonymously at this time. On May 8, 1981 plaintiffs filed a motion for intervention and summary judgment. The defendant opposed these motions in part because the true names of plaintiffs had not been revealed to him. Defendant's affidavit in support of his opposition stated that he had considered deposing plaintiffs pseudonymously but had decided not to. Even at this late date plaintiffs' counsel offered to allow defendant's counsel to meet with plaintiffs and plaintiffs' counsel. The state defendant's counsel rejected this offer and insisted on full disclosure with unlimited use of the information.

* The cross-petitioners position is contrary to well-settled proposition that in order for a defendant to oppose a plaintiff's motion for summary judgment because he lacks information, he must have taken advantage of available discovery methods and that Fed. R. Civ. P. 56(f) will not be applied to aid nondiligent defendants who have failed to make use of the various discovery devices that were at their disposal. See 10 C. Wright and A. Miller, Federal Practice and Procedure § 2740 at 726 (1973). King v. National Industries, Inc., 512 F.2d 29 (6th Cir. 1975); Southern Rambler Sales, Inc. v. American Motors Corp., 375 F.2d 932 (5th Cir.), cert. denied, 389 U.S. 832 (1967); Robin Constr. Co. v. United States, 345 F.2d 610 (3d Cir. 1965); Schneider v. McKesson & Robbins, Inc., 254 F.2d 827 (2d Cir. 1958).

Further, the facts which the cross-petitioner-defendant contends he needs petitioners' identities to dispute are not material to the constitutional question presented or the relief requested by the petitioners. The petitioners do not claim that they have an absolute right to marry. They only claim that they have, like minors who lie or circumvent New York State's laws, a procedural due process right to a hearing and deter mination by an appropriate state official of their capacity to marry. They alleged facts in their complaint and their other affidavits* sufficient to demonstrate that they had a stake in the outcome of the case. Warth v. Seldin, 422 U.S. 490, 498, 501 (1975). See H.L. v. Matheson, 450 U.S. 398 (1981). Specifically, Cristina and Pedro alleged that Cristina's mother had attempted to force her to have an abortion, refused to allow her to marry, and thereafter refused to have anything to do with Cristina, but Cristina and Pedro were about to become parents, that they were living together and supporting themselves, that they jointly had sought social work counselling, pre-natal care and parenting training in order to prepare for child birth, and child care, and their life together and that they wished to marry to legitimate their relationship and their child. It would have been inappropriate for the district court to determine whether these allegations were true and constituted sufficient evidence to demonstrate capacity to marry. To do so would have usurped the proper role of the state forum. Petitioners seek only the opportunity to present the facts of their situation for evaluation of their capacity to marry by an appropriate state official.

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* Cristina and Pedro's motions were supported by their affidavits and affidavits of a social worker and nurse midwife who had counselled them.

POINT II

THE CROSS PETITION CHALLENGING THE CIRCUIT COURT'S DETERMINATION ON THE ISSUE OF ABSTENTION WAS NOT TIMELY FILED AND THE LOWER COURTS' ABSTENTION DECISIONS WERE CONSISTENT WITH SUPREME COURT DECISIONS ON ABSTENTION.

The cross petition was filed on May 17, 1980 more than ninety days after the Second Circuit's opinion and judgment on the issue of abstention dated December 9, 1980. The cross petition is therefore not timely filed. 28 U.S.C. § 2101(c).

Further the decision of the Second Circuit, and the decision of the district court applying the Second Circuit's decision were consistent with this court's abstention decision. The legal standard for federal judicial abstention has been considered by this court many times and the standard is clear. When a state law is challenged on federal constitutional grounds, the federal court will abstain if the state statute is ambiguous and therefore susceptible to more than one interpretation and if one of the interpretations would save or modify the constitutional issue. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Zwickler v. Koota, 389 U.S. 241 (1967); Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) see Moe v. Dinkins, 635 F.2d 1047-1048 (Appendix D to Petition p. D-3 - D-4). Compare Belloti v. Baird, 428 U.S. 132 (1976) and Planned Parenthood v. Danforth, 428 U.S. 52 (1976) decided by this court on the same day. Both cases challenged state statutes which required parental consent for a minor's abortion. The Danforth statute was similar to New York Domestic Relations Law § 15. It provided that "No abortion shall be performed . . . except with the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years...." Planned Parenthood v. Danforth, 408 U.S. at 85. The Bellotti statute provided that if the parents refused consent, a court could override that refusal "for good cause shown."

Bellotti v. Baird, 428 U.S. at 134-135. This court abstained in Bellotti to allow the state court to interpret the good cause term in the statute, but did not abstain in Danforth.

Much as the petitioners and cross-petitioners might wish otherwise New York Domestic Relations Law § 15 is not ambiguous. It clearly mandates that, before they can marry, law abiding minors must have parental consent which has been personally acknowledged in writing before a designated state official. Parental consent is required regardless of the circumstances. The parent need not live with, support, care for or have any contact with the minor wishing to marry. The parent whose consent is required may even be insane and therefore unable to give reasoned consent. Moe v. Dinkins, 635 F.2d 1049 (Appendix D to petition, p. D-5) 1964 Op. Atty. Gen. 138. The minor wishing to marry may be pregnant or a parent with responsibility for an infant child or a mature and fully emancipated person. Moe v. Dinkins, 635 F.2d 1049 (Appendix D to petition, p. D-5); Berger v. Adornato, 76 Misc.2d 122, 350 N.Y.S.2d 520 (Sup. Ct., 1973). Parental consent may be withheld for any arbitrary reason or no reason at all. Moe v. Dinkins, 635 F.2d 1048 (Appendix D to petition, p. D-4); In re Powers, 96 Misc. 2d 183, 408 N.Y.S.2d 761 (Fam. Ct. 1978).

On behalf of the cross-petitioner, the New York State Attorney General's main claim is that a state court could appoint a guardian for the purpose of consenting to a minor's marriage. Not only is this position belied by the plain wording of the statute, it is ironic and inconsistent. Part of the authority relied on by courts interpreting New York Domestic Relations Law §15 is an official opinion of the New York State Attorney General which states that the consent of a court-appointed guardian cannot bypass Section 15's requirement of parental consent. 1973 Op. Atty. Gen. 144.

CONCLUSION

For the reasons stated above, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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Tasher J.

80 CIV 1572

U.S. DISTRICT COURT
FILED
MAR 19 1980
S.D. OF N.Y.

JUDGE MOTLEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARIA MOE, RAOUL ROE, and RICARDO ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

DAVID DINKINS, individually, and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually, and as New York State Commissioner of Health,

Defendants.

CIVIL ACTION NO.

EX PARTE ORDER PERMITTING COMMENCEMENT AND PROSECUTION OF THIS ACTION IN FORMA PAUPERIS, UNDER PSEUDONYMS, WITHOUT THE APPOINTMENT OF A GUARDIAN AD LITEM, FOR THE SEALING OF CERTAIN DOCUMENTS AND THE FILING OF A COMPLAINT WITH PSEUDONYMS

Upon the Plaintiffs' ex parte motion for leave to commence and prosecute this action (1) in forma pauperis, (2) under pseudonyms, (3) without the appointment of a guardian ad litem, and (4) for the sealing of certain documents and the filing of a complaint with pseudonyms, the supporting affidavits of Janet Calvo, Maria Moe and Raoul Roe, and upon all of the papers herein, it is hereby

ORDERED that Plaintiffs' ex parte motion for leave to commence and prosecute this action (1) in forma pauperis, (2) under pseudonyms, (3) without the appointment of a guardian ad litem be granted.

The named plaintiffs' affidavits and a complaint setting forth the plaintiffs' true names have been examined by this court and it is ordered that they be sealed by the Clerk of the Court and not opened by anyone without court order. It is ordered that a complaint with pseudonyms be filed.

DATED: New York, New York
MARCH 19 1980.

UNITED STATES DISTRICT JUDGE

(PART ONE)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DIST. CLERK FILED MAR 16 1981 S.D. OF N.Y.

Mac, Maria

Plaintiff(s), 80 CIV. 1577 (CBM)

-against-

Dunkins

PRE-TRIAL SCHEDULE AND ORDER

Defendant(s).

On _____ counsel for the defendant plaintiff _____, was notified by telephone to appear for a pre-trial conference in Room _____ on _____ at _____ M. Counsel was further told that the conference should be attended by an attorney thoroughly familiar with the facts of the case and that counsel should appraise all the other parties of this information.

All parties having appeared for a pre-trial conference on this day (with exceptions as noted), it is ORDERED that:

1. All discovery shall be concluded by all parties no later than _____.

2. Each party's pre-trial memorandum and proposed pre-trial ordered shall be due _____. A joint pre-trial order may be submitted if the parties can agree.

3. The next pre-trial conference shall be held in Room _____ on _____ at _____ M.

4. (Further orders, if any.)

(80 Civ. 4711 (CBM))

Further orders, if any, continued:

The motion to dismiss and for class certification will be heard on March 25 at 3:00 P.M.

The city defendant is directed to serve and file an answer by 3/20/81

5. ALL PARTIES ARE INSTRUCTED TO THOROUGHLY FAMILIARIZE THEMSELVES WITH THIS COURT'S "Memorandum to All Attorneys."

Copies are available in Chambers or will be supplied upon receipt of a stamped, self-addressed envelope.

Dated: New York, New York

3/13 19 81

SO ORDERED,

Charles L. Brieant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

Moe

Plaintiff(s). 80 CIV. 1577 (CBM)

-against-

Dinkins

PRE-TRIAL SCHEDULE AND ORDER

Defendant(s).

----------x

On _____ counsel for the defendant
plaintiff, _____,
was notified by telephone to appear for a pre-trial conference in Room _____ on _____ at _____ M. Counsel was further told that the conference should be attended by an attorney thoroughly familiar with the facts of the case and that counsel should appraise all the other parties of this information.

All parties having appeared for a pre-trial conference on this day (with exceptions as noted), it is ORDERED that:

1. All discovery shall be concluded by all parties no later than _____.

2. Each party's pre-trial memorandum and proposed pre-trial ordered shall be due _____. A joint pre-trial order may be submitted if the parties can agree.

3. The next pre-trial conference shall be held in Room 906 on April 24, 198 at 2:00 P. M.

4. (Further orders, if any.)

81 Civ. 1577 (CBM)

Further orders, if any, continued:

Mot. in to dismiss for lack of subject matter jurisdict. is denied ~~[illegible]~~ as to defendant Sikorsky.
Mot. in to certify ~~[illegible]~~ plaintiff and defendant classes granted.
Mot. in to dismiss of defendant Archbold denied.
Opinion on to forgoing to be filed by court.
Parties directed to brief mot. re to classes since. Plaintiffs brief due April 10, 1981. Defendant's brief due April 17, 1981. Plaintiffs response due April 27, 1981.

5. ALL PARTIES ARE INSTRUCTED TO THOROUGHLY FAMILIARIZE THEMSELVES WITH THIS COURT'S "Memorandum to All Attorneys."

Copies are available in Chambers or will be supplied upon receipt of a stamped, self-addressed envelope.

Dated: New York, New York
3/27 1981

SO ORDERED.

Charles L. D. J.